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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. [redacted] 99

WILLIAM E. EMMICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, William E. Emmick, respectfully shows:

I.

SUMMARY AND SHORT STATEMENT OF MATTER INVOLVED.

The petitioner brought an action against the respondent, The Baltimore and Ohio Railroad Company, a corporation, and Girton Brothers, Inc., for damages resulting from personal injury, in the Superior Court of Cook County, Illinois. The respondent was charged with a violation of the Federal Employers' Liability Act and the other defend-

ant with common law negligence. The jury returned a verdict finding both defendants guilty and assessing petitioner's damages in the amount of $100,000.

An appeal was taken by the respondent alone to the Appellate Court of Illinois. That Court reversed the judgment of the trial court, stating that as a matter of law there was no evidence of negligence on the part of the respondent, and the Supreme Court of the State of Illinois denied petitioner's petition for leave to appeal.

This petition is filed to induce the Supreme Court of the United States to sustain the verdict of the jury and the judgment of the trial court by reversing the judgment of the Appellate Court of the State of Illinois and the decision of the Supreme Court of the State of Illinois denying the Petition for Leave to Appeal.

The petitioner was a member of the train crew on one of the respondent's double-engine, high-speed passenger trains. A collision occurred between the train and a fully loaded gasoline truck at a public crossing at Lawrenceville, Illinois. Both engines were completely enveloped in flame, and the petitioner was severely burned.

Petitioner contends that the respondent failed to provide sufficient protection for its employees against the hazards of a collision at this crossing. The crossing was an unusually dangerous one by reason of the fact that a large number of gasoline trucks loaded with thousands of gallons of gasoline passed over this crossing daily (A. 105, 343). The crossing was dangerously constructed in that there was an unusually steep grade from the level of the street up to the tracks (A. 170, 334). The view of the truck driver approaching the crossing as well as that of the engineer of the locomotive approaching the crossing was obscured by reason of buildings and loading platforms and by reason of a freight car which the railroad company permitted to

remain standing on a switch track next to the main track, slightly west of the crossing (A. 65, 341). The only warning provided by the railroad company at this crossing was flasher lights; there were no bells or gates (A. 97). The gasoline truck had stopped at a point beyond one of the flasher lights before the lights began to operate (A. 333). There is evidence to the effect that the truck driver could not see the remaining flasher light as he approached the tracks from the point where he had stopped (A. 346). The time elapsing between the starting of the flasher lights and the arrival of the train at the crossing was a matter of seconds (A. 339).

II.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under the provisions of the Federal Employers' Liability Act (45 U. S. C. A. 827, Sec. 56).

The decision was rendered by the Supreme Court of the State of Illinois on March 16, 1950. The time within which a petition for rehearing might be filed expired March 31, 1950, on which day the judgment of the Supreme Court of the State of Illinois became final.

The case is reported in abstract form in 339 Ill. App. 147. The full opinion of the Court appears in the Abstract, page 6. And the order denying the petition for leave to appeal is noted in Volume 405 of the Illinois Supreme Court Reports.

III.

QUESTIONS PRESENTED.

The Appellate Court of the State of Illinois erroneously found "that there is no evidence of negligence on the part of the defendant and that the trial court should have entered a judgment *non obstante veredicto*"; and the Supreme Court of the State of Illinois, by denying the petition for rehearing, upheld the Illinois Appellate Court.

The record shows that there were no bells of any kind at the crossing, and no gates (A. 97, 215), and that the flasher lights start only a second or two before the train reaches the crossing (A. 61, 88).

There is no evidence that the driver of the gasoline truck saw any of the flasher lights. (The driver of the truck was killed in the accident.) He was past the light on Illinois Street before he stopped to talk to the dispatcher (A. 333). There was no warning by sound to bring the flasher lights to his attention, and there was ample evidence from which the jury could conclude that due to the construction of his cab, the grade of the crossing, and the height of the flasher lights, he could not have seen them (A. 346).

The Appellate Court held that "their (train crew) view of the crossing in question was not obstructed by the standing freight car." They arrived at this conclusion because the engineer in the second train said he saw the truck before the collision (A. 195). By the time this engineer saw the truck the train was practically upon the crossing (A. 195) and up until that time the freight car and other buildings along the right-of-way did obstruct the view of the train crew as well as the view of the truck driver (A. 173, 201, 207).

The Appellate Court found: "The blowing of the whistle continuously from 800 feet west of the 15th Street crossing

could and should have been heard by the driver of the truck, as he was driving 620 feet from the oil depot gate west on Illinois Street to the 12th Street intersection, and as he was slowly driving his truck toward the railroad crossing in question at 12th Street,"—entirely overlooking the undisputed testimony that the truck stopped at Illinois Street for approximately one minute (A. 334), so obviously no whistle was being blown as the truck proceeded on Illinois Street. The testimony of a witness at the crossing was: "I heard it whistle just before it struck, before the accident (A. 337). * * * It just seemed to me like it was just a flash, I would say maybe a second or two, just a very short time" (A. 339).

The Appellate Court, instead of examining the evidence in the light most favorable to the plaintiff, apparently determined that the Railroad, having provided flasher lights at the crossing, was incapable of any negligence. It then proceeds to pick out the evidence most favorable to the defendant with reference to the operation of these lights, and entirely overlooks the evidence of the petitioner's witnesses and the witnesses for the co-defendant with reference to the time that elapsed between the happening of the accident and the commencing of the flasher lights and the time that elapsed between the hearing of the whistle at the crossing and the happening of the accident—entirely disregarding plaintiff's evidence and contentions with regard to respondent's failure to adequately protect this crossing by some sort of bell or sounding device or gates, and completely overlooking the evidence with reference to the obstructions that blocked the view of the train crew and the truck driver.

In these circumstances the question is: May the Illinois Appellate Court and the Illinois Supreme Court reweigh the evidence and hold for naught the finding of the jury?

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

The Illinois Appellate Court and the Supreme Court of the State of Illinois have decided an important question of federal law which has not been but should be settled by this Court. Under the Federal Employers' Liability Act one of the duties resting upon a railroad company is the use of reasonable diligence to provide and maintain for its employees a reasonably safe place to work. This obviously includes adequate protection at crossings against collisions with other vehicles.

The Appellate Court of Illinois and the Supreme Court of Illinois have decided a federal question of substance and have decided it in a way probably not in accord with applicable decisions of the Supreme Court of the United States. It is submitted that these reasons call for the exercise of this Court's power of review.

Wherefore petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Court commanding the Supreme Court of the State of Illinois to certify and send to this Court for its review and determination on a day certain named therein a complete transcript of the record in the case numbered and entitled on its docket as Number 31437, William E. Emmick, Petitioner *vs.* The Baltimore and Ohio Railroad Company, a corporation, Respondent; that the judgment of the Supreme Court of the State of Illinois be reversed by this Court; and that the Petitioner may have such other and further relief as seems just.

Respectfully submitted,

WILLIAM E. EMMICK,
Petitioner,
By EDWARD J. BRADLEY,
Attorney for Petitioner.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

ARGUMENT

(A)

THE VERDICT WAS SUSTAINED BY THE EVIDENCE.

Plaintiff's right of action against the defendant is based upon the claim that the railroad company negligently failed to provide the plaintiff with a reasonably safe place to work. The plaintiff's right of action grows out of the negligence of the defendant, as master, in failing to furnish the plaintiff, as servant, a reasonably safe place to work and

its failure to use precautions easily available to guard against the unusual dangers of the situation.

The railroad crossing at Twelfth Street consisted of two main line tracks over which trains were frequently driven at the rate of 75 to 85 miles per hour (A. 103, 120).

Instead of the roadway approaching the crossing being level, as it usually is in cities, it was much lower to the south than the tracks (A. 86). From Illinois Street, which is about 43 feet south of the crossing, to the crossing there is a grade of 7.7%. From a point 25 feet south of the crossing to the top of the crossing there is a grade of 9.04%.

There were merely two flasher lights, one at the northwest corner and the other at the southeast corner of the intersection (A. 78). These lights were at least 10 feet 6 inches above the rails (A. 177) and could be seen by the driver riding in the cab of a truck only when far enough back (A. 69).

The plaintiff at the time of the accident was the fireman on the first of two locomotives attached to a train traveling at the rate of 85 miles per hour over the crossing (A. 119).

The loaded gasoline truck of Girton Brothers proceeded up the incline to the railroad crossing at the rate of 1 or 2 miles per hour and emerged from behind buildings and a freight car standing on a siding just south of the eastbound main only a few feet west of Twelfth Street.

It was impossible for the engineer operating the head engine of the train to see the approaching truck, because of the obstructions, until he was but a few feet from Twelfth Street. The accident was inevitable.

The Texaco Refinery was located just south of the railroad tracks and east of Twelfth Street, and, although to the knowledge of the railroad company more than fifty truck loads of gasoline came out from the refinery and

crossed the Twelfth Street crossing every day (A. 344), no gates, watchmen or bells in addition to the flasher lights were provided (A. 97, 215). There was not sufficient notice given drivers of the approach of high speed trains.

Negligence of Railroad Company Under Federal Employers' Liability Act.

The Federal Employers' Liability Act is not a compensation act or a negligence act, but is a pure liability act, and as such it must be construed.

Under the Federal Employers' Liability Act, the defendant is made liable for damages resulting from injuries caused through the negligence of the company or any of its employees. The United States Court has held that negligence is to be determined according to the rules of common law. Accordingly, the duties and obligations in master and servant law are to be applied as at common law.

In some particulars these rules have been modified by Congress in abolishing the common law defenses of assumed risk, contributory negligence and fellow servant.

One of the duties resting upon the defendant under the rules of common law was the use of reasonable care and diligence to provide and maintain for the plaintiff a reasonably safe place in which to work.

Did the defendant, knowing all the extra hazards and dangers of the Twelfth Street crossing, use reasonable diligence in the manner in which it maintained the crossing? It will not be difficult to show that this was a question of fact which was properly left to the jury to decide.

The crux of the plaintiff's claim is best stated in the words of the complaint: "* * * the defendant Baltimore and Ohio Railroad Company maintained its signal system in such manner that no sufficient notice was given either

to the engineer in charge of said locomotive or to the drivers of vehicles over said highway of the approach of trains" (A. 37).

Permit us to briefly call attention to the evidence sustaining these charges:

The Gasoline Truck.

Shortly before the accident the driver of the gasoline truck proceeded in a westerly direction in Illinois Street into Twelfth Street, where the tractor stopped.

There was a yellow flasher facing toward the east in Illinois Street at Twelfth Street synchronized with the railroad flasher lights. But a contingency occurred which was unlooked for and unexpected.

The gasoline truck, after leaving the Texaco Refinery, proceeded in a westerly direction in Illinois Street toward Twelfth Street. Up to the time that the gasoline truck had come to Twelfth Street this flasher signal was not in operation. A dispatcher for Girton Brothers, while in Twelfth Street, saw the gasoline truck approaching in Illinois Street and he stopped the driver of the gasoline truck to talk to him. The tractor stopped at the curbstone in Twelfth Street. At the time the tractor passed the flasher light it was not working (A. 63, 333).

The driver for Girton Brothers was a new man, this being the first time he had ever taken a load of gasoline out of the refinery (A. 333).

Railroad Crossing.

Illinois Street intersected Twelfth Street on the east at a distance estimated from 40 to 60 feet south of the railroad tracks. There was a dip in Twelfth Street where Illinois Street comes in which caused the tractor on the gasoline truck to point down (A. 346).

Some witnessess said there was a steep rise in the approach to the crossing, greater than usual (Abst. 86). Another witness said that the grade from a point 43 feet south of the railroad crossing was 7.77%, whereas from a point 25 feet south of the crossing to the crossing the grade was 9.04%.

The tractor involved in this accident had a cab and a visor, the top of which was 7 feet above the ground (A. 341).

The flasher lights were on posts 10 feet 6 inches high (A. 177).

Obstructions.

Not only were there various buildings on the south side of the eastbound main, but a single freight car had been permitted to stand for a whole day on a switch track just south of the eastbound main at a point 6 to 8 feet west of Twelfth Street (A. 90, 92).

One witness said you could not see down the track on account of the box car (A. 68).

Reed, the engineer on the second engine, said those things prevented his seeing the truck as it approached (A. 204, 205).

Whether because of the dip in Twelfth Street at the intersection of Illinois Street or because of the unlawful and excessively steep grade in the approach to the track the driver of the gasoline truck was unable to see the flashers in his normal view through the windshield, no one will ever know, because he was killed.

Flourean Wells, a witness for the plaintiff, in speaking of the flasher lights, said, "You could see them if you were back far enough" (A. 69, 70).

Failure of the Railroad Company to Take Proper Precautions Against Unusual Hazard.

Here was a railroad crossing far more dangerous than the ordinary crossing. Not only were there unnecessary obstructions that prevented both the engineers on the engines and the truck drivers from seeing the approach of trucks and trains, but there was an unusually steep approach which made the movement of heavily loaded gasoline trucks difficult. But the great hazard was caused by the fact that so much of the traffic consisted of large tanks loaded with thousands of gallons of highly explosive gasoline.

Hensley, the Texaco gateman, testified that from 60 to 75 tanks filled with gasoline went over that crossing every day (A. 105). His testimony is not disputed.

Plaintiff, prior to the accident, discussed the dangers of the crossing with his superior (A. 143).

Reed, the engineer on the second locomotive, knew that tanks of gasoline frequently crossed the tracks at the Twelfth Street crossing (A. 210) and had to depend solely on the whistle and flashers to stop truck drivers (A. 211).

All the members of the engine crews testified it was impossible to see the gasoline truck until it was up to the track (A. 121, 108, 195).

No reasonable man could say that the railroad company used sufficient care in the use of flashers alone.

It is not known just why the driver of the gasoline truck went upon the crossing against the flashers. It may be that the construction of the cab of the truck together with the dip in Twelfth Street made it impossible for him to see the lights at all, or it may be that for a moment he may have become sleepy, or he may from exhaustion have not been alert. At any rate, by the use of additional devices this

accident might have been avoided. Had automatic gates or bells been installed, or a watchman provided, the accident could readily have been averted.

George F. Cannon, signal supervisor employed by the railroad company, testified that there is such a thing as an automatic gate, and that they have some in use on the railroad (A. 255). He further testified:

> "I have seen some drivers of automobiles that don't always observe the flasher lights, and when they don't the engineer and the fireman and the trainmen on trains are subjected to danger. I would say that there is no way that a fireman or engineer could protect himself against the drivers of automobiles who drive through a crossing against a flashing of signals" (A. 256).

William Luckett, a locomotive fireman, testified:

> "Another reason for watching the lights at the Twelfth Street crossing, other than the obligation to report a failure of those lights, was possibly on account of those trucks, whose gasoline and oil trucks that pass that crossing so often (A. 308). I had a dread of gasoline trucks crossing the crossing. They cross slow, and if you drive with any speed why it doesn't take long to pick one of them up" (A. 309).

There are not many similar cases reported under the Federal Employers' Liability Act, but the case of *Louisville & Nashville R. R. Co.* v. *Carter,* 10 S. W. (2d) 1064, is worth while calling to the Court's attention. In that case a train collided with an automobile at a public crossing which the Court said was very dangerous. At page 1068 the Court said:

> "This being true, did the appellee here, by resting his case on the failure of the crossing bell to ring, establish any breach of duty owing him by the appellant? The appellant insists that it was under no duty to maintain a crossing bell for the appellee; that the duty to maintain such a bell was one owing only to the

traveling public. The appellant, however, has not analyzed what is the real issue here present. The appellant must concede that it owed as much a duty to its employees on the train not charged with the discharge of such duty to exercise ordinary care to avoid colliding with a traveler on a public crossing, by reason of which the employees might be injured, as it did to the traveler to avoid colliding with him whereby he might be injured. The duty was to avoid the collision. Now in the discharge of that duty it was incumbent on the carrier to exercise ordinary care. Due to the dangerous condition of this crossing, ordinary care required the appellant, in addition to the ordinary statutory signals, to maintain a crossing bell or some other device reasonably calculated to warn the public of the approaching train. The sole purpose of such a device was to avoid a collision. The duty to exercise ordinary care was owed as much to the employee as it was to the public. The measure of this duty was the maintenance of some warning device in addition to the statutory signals that would reasonably tend to prevent collisions. Therefore, when the device maintained became out of order, and remained out of order, the carrier was not exercising ordinary care to avoid a collision, and for such failure the employee had a right to maintain this action."

In the case of *Boston & M. R. R.* v. *Meech,* 156 Fed. (2) 109, it appeared that the deceased was employed as machinist's helper; that on the night of the accident he was assigned to removing lanterns, oilers and small tools from incoming locomotives; that the driver of the locomotives could not see an employee as the locomotive was backed into the washstand, and that no whistle signal was given to the deceased as the locomotive was backed in, although it appeared from the evidence that the deceased could have taken more care for his own safety either by standing back from the engine platform or by watching more closely for locomotives coming in. The Court said:

"It may be that the locomotive was being operated

in the way usual and customary for the maneuver which resulted in the death of the decedent, but, nevertheless, the fact remains that it could have been operated more carefully. Another man could have been assigned to ride with the hostler to keep a lookout from the fireman's side of the cab or from the rear of the tender for the workmen in the vicinity of the engine house who might be presumed to be busy and hence inattentive at times to their own safety, or the whistle on the locomotive could have been sounded as it drew into the washstand to warn the men assigned there, as the decedent had been, to 'strip' it. * * *

"From the foregoing it is clear that, although some precautions were taken for the decedent's safety, further precautions were possible, and from this it follows, as we read the decisions cited above, that there was an 'evidentiary basis' for submitting the issue of the defendant's occasional negligence to the jury, and hence that our function is exhausted."

The respondent owed the same degree of care to its employees that it owed to the public at this crossing. In the case of *Murray* v. *Atlantic Coast Line R. Co., et al.,* 218 N. C. 392; 11 S. E. 2d 326 the court said at page 333:

"Likewise, in performing its duty to the plaintiff to exercise reasonable care to provide for him a reasonably safe place in which to work, the defendant railroad company owed the duty to plaintiff to exercise ordinary care in providing and maintaining reasonable warning to travelers upon the highway of the presence of plaintiff at work on the crossing in the highway."

While the court held against the plaintiff in this case on the main issue of negligence in a dissenting opinion it was stated:

"Divested of confusing technicalities, I think the case boils down to this: The jury might well have held under the evidence, that the defendant omitted many precautions which common sense, experience of the road, and the practice of prudent men, indicate as rea-

> sonably necessary to the safety of men working in the avenue of travel;—and yet it is held, as a matter of law, that the defendant is free from negligence. We have an occurrence which the evidence tends to show, and the jury might have found, was the natural and probable result of these omissions;—and the Court holds, as a matter of law, it was not forseeable. We have an injury which the jury might well have inferred would not, and could not, have happened except for the contributory negligence of the defendant,—and the Court holds that the supposed negligence of Mrs. Elliot intervened and insulated it from liability." * * * "At every step in the process of taking this case from the jury, as a matter of law, the presence of undetermined fact, like Banquo's ghost, haunts the exercise of judicial power."
>
> "In the very complex situation disclosed by the facts, the inferences cannot be all one way and against the plaintiff. The case should have been left to the jury with appropriate instructions."

Since it is recognized that the respondent owed the same duty to its employees that it owed to the public at this crossing it follows that cases construing the duty of railroads to the public at extra hazardous crossings should be considered in determining the railroad's liability in this case.

In the case of *Lauer* v. *Elgin, J. & E. Ry. Co.*, 305 Ill. App. 200, 27 N. E. (2d) 315-317, the Court said (page 206):

> "We think the jury could reasonably find that there were special dangers here and special conditions. The fact that this was a through street and that the tracks were six in number (some of them used for storage purposes) tended very much to increase the danger to travelers. These unusual facts distinguish this case from all the others cited and made it a question for the jury to decide as to the precautions necessary in the exercise of due care. The precautions should, of course, be commensurate with the dangers and the risks."

In *Leif* v. *Fleming et al.*, 321 Ill. App. 297, 52 N. E. (2d) 606 (Abstract Opinion), the Court held:

> "Notwithstanding no statute or ordinance requires any particular means of crossing protection, a railroad must provide such protection as public safety or common prudence requires, particularly where the crossing is dangerous."

In *Thomas* v. *Pennsylvania R. R. Co.*, 70 Ohio App. 191, 45 N. E. (2d) 776, 778, the Court said:

> "Where a railroad company uses tracks across a generally traveled public street and the crossing thereby is rendered exceptionally dangerous, it is bound to exercise care proportionate to the increased danger to avoid injury to persons using the crossing, and should, in the exercise of such care, as a reasonable precaution for their safety and means of preserving the legitimate use of the street, maintain flagmen or gates at such crossing or adopt other equally adequate measures for that purpose."

In *Cyr* v. *Boston & M. R. R.*, 188 A. 3, 4, the Court said:

> "Reasonable need of special crossing protection is to be determined by the special and unusual dangers of the crossing considered, and among the special features of pertinent bearing are the clearness of view of the track, the amount and character of travel over the crossing and the extent of train movements there. (Cases cited.) Applying this test to the evidence in the case before us, it is clear that reasonable men might find that due care required more protection at the Main Street crossing than that provided by the defendant."

In *Leedom* v. *Pennsylvania R. Co.*, 29 A. (2d) 171, 172, the Court said:

> "Railroad companies are under a duty to exercise reasonable care and diligence in warning the public of the approach of its train to intersections of its tracks with highways; and the sufficiency of the means of

warning actually employed is, in general, to be determined by the peculiarly dangerous condition existing at the crossing."

In *Roberts* v. *Powell, et al.*, 187 So. 766, 769, the Court said:

> "A mere perfunctory blowing of a whistle and ringing of a bell at or near a crossing to give warning of an approaching train where it is being driven under such circumstances and at such speed as to reduce the so-called warning of its approach to its minimum value for the prevention of injury to a traveler on the highway desiring to cross the track of the railroad may not be sufficient to discharge the obligation of the railroad company at such time and place."

In *Fish* v. *Southern Pac. Co.*, 143 P. (2d) 917, 920, where it was alleged that a box car obstructed the view of an approaching train, the Court said:

> "It seems to us, however, that the impermanence of the obstruction may not be insisted upon if in fact it created an unusual hazard at that time and place. The jury might have considered that the situation called for the appellant to provide a watchman at the crossing until the transient obstruction was removed."

In *Peri et al.* v. *Los Angeles Junction Ry.*, 137 P. (2d) 441, 447. the Court said:

> "Where the conditions existing at the crossing create an unusual hazard or danger, the operator of the railroad must exercise care commensurate with those circumstances, and whether he has done so is a question of fact."

The following cases announce the same rule with reference to dangerous crossings:

Smith v. *Southern Ry. Co.*, 35 S. E. (2d) 225, 228.
McParlan v. *Grand Trunk Western R. Co.*, 273 Mich. 527; 263 N. W. 734, 736.

Mannino v. *Boston & M. R. R.*, 14 N. E. (2d) 122, 125.

Kurn et al. v. *Campbell et al.*, 112 P. (2d) 386, 389.

Carbone v. *Boston & Maine R. R.*, 192 A. 858, 860.

Aaron v. *Martin, et al.*, 167 So. 106, 108.

Eggleston v. *Louisiana & A. Ry. Co., et al.*, 192 So. 774, 778.

Fleming v. *Missouri & A. Ry. Co.*, 128 S. W. (2d) 986, 988.

Raustrom v. *Oregon Short Line R. Co. et al.*, 18 F. Supp. 256, 258.

(B).

THE ILLINOIS APPEAL COURTS HAVE DISREGARDED THE APPLICABLE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES IN SETTING ASIDE THE VERDICT OF THE JURY IN THIS CASE.

After considering all of the evidence, the jury found the respondent guilty of negligence and rendered a verdict against it. The facts heretofore stated amply support the jury's verdict. The Appeal Courts of Illinois, in reversing the jury, usurped the jury's function.

There can be no question that all courts are bound by the interpretation made by the United States Supreme Court of the Federal Employers' Liability Act. It was the purpose of Congress in adopting this law to establish a Liability Act which under certain circumstances rendered a railroad company liable to its injured employees for damages. Following the adoption of the law many courts, by strained construction, have attempted to limit the effect of the law, and thus injured workmen were deprived of their rights.

Commencing with the case of *Bailey, Admx.* v. *Central Vermont Ry. Co.*, 319 U. S. 350, 87 L. Ed. 1444, decided

May 24, 1943, this Court has decided a series of cases which have in no uncertain terms established the rules of construction to be followed by all courts inferior to the Supreme Court of the United States in setting aside the verdict of a jury.

In the *Bailey* case the Court said:

> "As stated by this Court in the Patton Case, it is a duty which becomes 'more imperative' as the risk increases. 'Reasonable care becomes then a demand of higher supremacy, and yet in all cases it is a question of the reasonableness of the care—reasonableness depending upon the danger attending the place or the machinery.' * * * That duty of the carrier is a 'continuing one' (*Kreigh* v. *Westinghouse, C. K. & Co., supra,* (214 U. S. p. 256, 53 L. Ed. 988, 29 S. Ct. 619)) from which the carrier is not relieved by the fact that the employee's work at the place in question is fleeting or infrequent.
>
> "The nature of the task which Bailey undertook, the hazards which it entailed, the effort which it required, the kind of footing he had, the space in which he could stand, the absence of a guard rail, the height of the bridge above the ground, the fact that the car could have been opened or unloaded near the bridge on level ground—all these facts and circumstances for the jury to weigh and appraise in determining whether respondent in furnishing Bailey with that particular place in which to perform the task was negligent. The debatable quality of that issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue (*Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. ....., *ante,* 446, 63 S. Ct. 444, *supra*) as well as issues involving controverted evidence. *Jones* v. *East Tennessee, V. & G. R. Co.,* 128 U. S. 443, 445, 32 L. ed. 478, 480, 9 S. Ct. 118; *Washington & G. R. Co.* v. *McDade,* 135 U. S. 554, 572, 34 L. ed. 235, 241, 10 S. Ct. 1044. To withdraw such a question from the jury is to usurp its functions.

> "The right to trial by jury is a 'basic and fundamental feature of our system of federal jurisprudence.' *Jacob* v. *New York,* 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854. It is part and parcel of the remedy afforded railroad workers under the Employers' Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries."

This Court has now held that the jury is the sole arbiter of the facts of the case, and unless there is a complete absence of evidence and reasonable inferences to be drawn from the facts supporting the plaintiff's case, it is the duty of the Court to submit those facts to the jury for their determination.

In the case of *Tennant* v. *Peoria & Pekin Union R. Co.,* 321 U. S. 29, 88 L. Ed. 520, the Court said (pp. 325-326):

> "It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body. It weighs the contradictory evidence and inferences, judges the credibility of witnesses, receives expert instructions, and draws the ultimate conclusion as to the facts. The very essence of its function is to select from among conflicting inferences and conclusions that which it considers most reasonable."

The engineers and firemen upon the locomotives in question were absolutely powerless to protect themselves against the danger of a collision with the gasoline truck at the crossing in question. The view of the crossing was obstructed. It was not possible to see the gasoline truck until it was just about to enter upon the track.

The train was required to be driven at a high rate of speed—85 miles per hour. A collision with a gasoline truck always results in severe injuries and death.

It was a question of fact for the jury whether the railroad company, in furnishing the flasher lights, had done all that was required of it under the circumstances, and whether the lights started to flash in time. Additional precaution might easily have been taken by the railroad company either by furnishing a watchman, bells or automatic gates. It was for the jury to determine if the train whistle was heard at the crossing in time to warn the truck driver. The inferences to be drawn from this evidence was for the jury and not the Court.

In the case of *Lavender* v. *Kurn*, 327 U. S. 645, 90 L. Ed. 916, the Court said:

> "It is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or the evidence is such that fairminded men may draw different inferences, a measure of speculation and conjecture is required on the part of those those duty is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis become apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable.
>
> "We are unable, therefore, to sanction a reversal of the jury's verdict against Frisco's trustees. Nor can we approve any disturbance in the verdict as to Illinois Central. The evidence was uncontradicted that it was very dark at the place where Haney was working and the surrounding ground was high and uneven. The

evidence also showed that this area was entirely within the domination and control of Illinois Central despite the fact that the area was technically located in a public street of the City of Memphis. It was not unreasonable to conclude that these conditions constituted an unsafe and dangerous working place and that such conditions contributed in part to Haney's death, assuming that it resulted primarily from the mail hook striking his head."

In the case of *Blair* v. *Baltimore and Ohio Railroad Company,* 323 U. S. 600, the Pennsylvania Supreme Court held that the petitioner had assumed the risk of the injury by remaining in the employment and *that there was no evidence to support negligence in any respect.* 349 Pa. 436, 37 A. 2d 736. This Court held: "To deprive railroad 'workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them.' *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 354, 87 L. ed. 1444, 1447, 63 S. Ct. 1062. Because important rights under the Act were involved, we granted certiorari."

In *Ellis* v. *Union Pac. R. Co ,* 329 U. S. 649, 91 L. Ed. 572, the Court said (p. 576):

"The choice of conflicting versions of the way the accident happened, the decision as to which witness was telling the truth, the inferences to be drawn from uncontroverted as well as controverted facts, are questions for the jury. *Tennant* v. *Peoria & P. U. R. Co.,* 321 U. S. 29, 88 L. ed. 520, 64 S. Ct. 409, 15 N. C. C. A. (N. S.) 647; *Lavender* v. *Kurn,* 327 U. S. 645, 90 L. ed. 916, 66 S. Ct. 740, *supra.* Once there is a reasonable basis in the record for concluding that there was negligence which caused the injury, it is irrelevant that fair-minded men might reach a different conclusion. For then it would be an invasion of the jury's function for an appellate court to draw contrary inferences or to conclude that a different conclusion would be more reasonable."

If the construction placed by this Court on the Federal Employers' Liability Act has not been entirely clear up to the present time, the recent case of *Wilkerson* v. *McCarthy*, 93 L. Ed., 336 U. S. 53, dispels all doubt. There the plaintiff, while performing duties as an employee of the defendant railroad, was injured by falling into a pit in the defendant's railroad coach yard when crossing the pit on a narrow boardway. The trial Judge directed the jury to return a verdict in favor of the railroad company. The state court affirmed the judgment. The judgment was reversed by this Court. Mr. Justice Black in his opinion stated:

> "Much of the respondents' argument here is devoted to the proposition that the Federal Act does not make the railroad an absolute insurer against personal injury damages suffered by its employees. That proposition is correct, since the Act imposes liability only for negligent injuries. Ct. *Coray* v. *Southern P. R. Co.*, 335 U. S., p. 807, *ante*, 16, 69 S. Ct. 29. But the issue of negligence is one for juries to determine according to their finding of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold a master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances,' bearing in mind that 'the standard of care must be commensurate to the dangers of the business.'"

In a concurring opinion, Mr. Justice Douglas had this to say:

> "While I join in the opinion of the Court, I think it appropriate to take this occasion to account for our stewardship in this group of cases.
>
> "The Federal Employers Liability Act was designed to put on the railroad industry some of the cost for the legs, eyes, arms, and lives which it consumed in its operations. Not all these costs were imposed, for

the Act did not make the employer the insurer. The liability which it imposed was the liability for negligence. But judges had created numerous defenses—fellow-servant rule, assumption of risk, contributory negligence—so that the employer was often effectively insulated from liability even though it was responsible for maintenance of unsafe conditions of work. The purpose of the Act was to change that strict rule of liability, to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.'

"That purpose was not given a friendly reception in the courts. In the first place, a great maze of restrictive interpretations were engrafted on the Act, constructions that deprived the beneficiaries of many of the intended benefits of the legislation. See *Seaboard Air Line R. Co.* v. *Horton*, 233 U. S. 492, 58 L. Ed. 1062, 34 S. Ct. 635, L. R. A. 1915C 1, Ann. Cas. 1915C 475, 8 N. C. C. A. 834; *Toledo, St. L. & W. R. Co.* v. *Allen*, 276 U. S. 165, 72 L. Ed. 513, 48 S. Ct. 215; and the review of the cases in *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 62-67, 87 L. Ed. 610, 614-618, 63 S. Ct. 444, 143 A. L. R. 967. In the second place doubtful questions of fact were taken from the jury and resolved by the courts in favor of the employer. This Court led the way in overturning jury verdicts rendered for employees. See *Chicago, M. & St. P. R. Co.* v. *Coogan*, 271 U. S. 472, 70 L. Ed. 1041, 46 S. Ct. 564; *Missouri P. R. Co.* v. *Aeby*, 275 U. S. 426, 72 L. Ed. 351, 48 S. Ct. 177; *New York C. R. Co.* v. *Ambrose*, 280 U. S. 486, 74 L. Ed. 562, 50 S. Ct. 198. And so it was that a goodly portion of the relief which Congress had provided employees was withheld from them.

"The first of these obstacles which the courts had created could be removed by Congress. In 1939 Congress did indeed move to release the employees from

the burden of assumption of risk which the Court had reimposed on them. 53 Stat. 1404 c 685, 45 U. S. C. A., Sec. 54, 10A F. C. A. title 45, Sec. 54; *Tiller* v. *Atlantic Coast Line R. Co.*, 318 U. S. 54, 87 L. Ed. 610, 64 S. Ct. 444, 143 A. L. R. 967, *supra*. The second evil was not so readily susceptible of Congressional correction under a system where liability is bottomed on negligence. Since the condition was one created by the Court and beyond effective control by Congress, it was appropriaate and fitting that the Court correct it. In fact, a decision not to correct it was to let the administration of this law be governed not by the aim of the legislation to safeguard employees but by a hostile philosophy that permeated its interpretation.

"The basis of liability under the Act is and remains negligence. Judges will not always agree as to what facts are necessary to establish negligence. We are not in agreement in all cases. But the review of the cases coming to the Court from the 1943 Term to date and set forth in the Appendix to this opinion shows, I think, a record more faithful to the design of the Act than previously prevailed.

"Of the 54 petitions for certiorari filed during this period, 20 have been granted. Of these one was granted at the instance of the employer, 19 at the instance of an employee. In 16 of these cases the lower court was reversed for setting aside a jury verdict for an employee or taking the case from the jury. In the one case granted at the instance of the employer we held that it had received the jury trial on contributory negligence which it was entitled. In these 20 cases we were unanimous in 10 of the decisions which we rendered on the merits.

"Of the 34 petitions denied, 21 were by the employers claiming that jury verdicts were erroneous or that new trials should not have been ordered. The remaining 13 were filed by employees. In 9 of these the lower court had withheld the case from the jury and rendered judgment for the employer, in 3 it had sustained jury verdicts for the employer, and in 1 reversed a jury verdict for the employee and directed a new trial.

"From this group of cases three observations can be made:

"(1) The basis of liability has not been shifted from negligence to absolute liability.

"(2) The criterion governing the exercise of our discretion in granting or denying certiorari is not who loses below but whether the jury function in passing on disputed questions of fact and in drawing inferences from proven facts has been respected.

"(3) The historic role of the jury in performing that function, see *Jones* v. *East Tennessee, V. & G. R. Co.*, 128 U. S. 443, 32 L. Ed. 478, 479, 9 S. Ct. 118; *Washington & G. R. Co.* v. *McDade*, 135 U. S. 554, 572, 34 L. Ed. 235, 241, 10 S. Ct. 1044; *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 87 L. Ed. 1444, 63 S. Ct. 1062, *supra*, is being restored in this important class of cases."

Considering the unusual dangers to which the plaintiff and the other trainmen were subjected in crossing the Twelfth Street crossing—the fact that large numbers of trucks loaded with gasoline crossed over the Twelfth Street crossing daily; that a collision with a gasoline truck always results in terrific damage; that the driver of some gasoline truck, through inadvertence, might fail to observe the flasher lights or an approaching train, or that he might momentarily become drowsy, or that the driver might be one of those persons who was habitually careless—it would seem that reasonable care would require safeguards in addition to the mere flasher lights. Engineers and firemen on locomotives traveling across the Twelfth Street intersection at high rates of speed were constantly subject to ever present dangers which might easily have been eliminated.

CONCLUSION.

It must be apparent that the Illinois Appellate Court and the Illinois Supreme Court have improperly usurped the functions of the jury in total disregard of the decisions of the Supreme Court of the United States; that the Illinois Appeal Courts have improperly attempted to weigh the evidence. We pray that this court will grant our petition and consider this appeal upon its merits.

Respectfully submitted,

EDWARD J. BRADLEY,
Attorney for Petitioner.

JUL 20 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 99

WILLIAM E. EMMICK,

Petitioner,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,
A CORPORATION,

Respondent.

PETITIONER'S REPLY BRIEF.

MOTION TO AMEND PETITION FOR WRIT OF CERTIORARI AND THE BRIEF IN SUPPORT THEREOF; AMENDMENT TO PETITION FOR WRIT OF CERTIORARI AND TO BRIEF IN SUPPORT THEREOF.

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